

1  
2  
3  
4  
5  
6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9

10 PEDRO CRUZ HERNANDEZ, F-11032, )  
11 Plaintiff(s), ) No. C 11-3223 CRB (PR)  
12 vs. ) ORDER OF DISMISSAL  
13 F. GONZALEZ, et al., ) (Docket #2)  
14 Defendant(s). )  
15

---

16 Plaintiff, a prisoner at the California Correctional Institution in Tehachapi,  
17 has filed a pro se complaint under 42 U.S.C. § 1983 attacking the validity of his  
18 state criminal conviction and sentence. He also seeks leave to proceed in forma  
19 pauperis under 28 U.S.C. § 1915 (docket # 2), which, based solely on his  
20 affidavit of poverty, is GRANTED.

21 Plaintiff's action must be dismissed without prejudice because it is well-  
22 established that any claim by a state prisoner that would necessarily imply the  
23 invalidity of his conviction or continuing confinement, as plaintiff's claim would  
24 here, must be brought in a habeas petition under 28 U.S.C. § 2254 after  
25 exhausting state judicial remedies. See Nelson v. Campbell, 541 U.S. 637, 642-  
26 44 (2004); see also Calderon v. Ashmus, 523 U.S. 740, 747 (1998) (claim by a  
27 prisoner attacking the fact or duration of his confinement must be brought under  
28 the habeas sections of Title 28 of the United States Code).

1 For the foregoing reasons, the complaint is DISMISSED without prejudice  
2 to filing a habeas petition under § 2254 after exhausting state judicial remedies  
3 or, since it appears that petitioner already has filed a habeas petition, seeking to  
4 amend his pending habeas petition to add new claims after exhausting state  
5 judicial remedies.

6 The clerk shall enter judgment in accordance with this order, terminate all  
7 pending motions as moot, and close the file.

8 SO ORDERED.

9 DATED: July 15, 2011

  
CHARLES R. BREYER  
United States District Judge